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JURISDICTION OVER FOREIGN CORPORATIONS

BY EDWARD S. STIMSON

I. INTRODUCTION

Sovereign power is territorial.¹ There are, of course, exceptions. A sovereignty may exercise its power on the high seas outside the territory of any nation; for example, on board ships flying its flag, and piracy is justiciable in any sovereignty.² On land the chief exception is the power which a sovereignty has over its citizens who are abroad.³ In Anglo-American law a sovereignty has no legislative, executive, or judicial power over property or non-nationals within the territory of another sovereignty. With the above exceptions its power is limited to persons and property within its own territory.

Sometimes it is said that a sovereignty's power is limited to persons, property, and *acts* within its own territory. Can power or jurisdiction depend upon an act?

The basis of jurisdiction is physical power.⁴ It cannot be said that a sovereignty has physical power, sway, or control over an act. A sovereignty cannot act upon or deal with an act. It cannot impound or destroy an act. It can only affect an act indirectly through its power over the actor. It would seem then that whether or not a sovereignty's law applied to a particular act would depend upon the location of the actor at the time he performed the act and not upon the location of the act.

Laying aside the possibility that jurisdiction may depend upon an act, suppose we apply to foreign corporations the principle that a sovereignty's power is limited to persons and property within its territory. The difficulty in applying the territorial principle to corporations arises from the fact that corporations are intangible.⁵ Being intangible a corporation can have no lo-

¹ Story on Conflict of Laws 8th Ed. (1883) sec. 18.

² 1 Oppenheim's International Law 4th Ed. (1928) sec. 146.

³ 1 Oppenheim's International Law 4th Ed. (1928) sec. 145.

⁴ McDonald v. Mabey (1916) 243 U. S. 90, 91.

⁵ Hutchinson v. Chase & Gilbert (C. C. A. 2, 1930) 45 F. (2d) 139; Noel Construction Co. v. Smith & Co. (C. C. Md. 1911) 193 F. 492, 495; Farmer's & Merchants Bank v. Federal Reserve Bank (D. C. E. D. Ky. 1922) 286 F. 566, 569; Wood v. The Hartford Fire Insurance Co. (1839) 13 Conn. 201, 208; Friend & Co. v. Goldsmith (1923) 307 Ill. 45, 50, 138 N. E. 185, 187.

cation in space. It is not present anywhere. Jurisdiction over it cannot depend upon its physical presence or location in any particular place. How then are we to apply a territorial principle of jurisdiction to that which can have no geographical situs?

The solution of this problem would seem to lie in centering attention upon the human representatives of the corporation instead of the intangible entity. Application of the general principle of jurisdiction would produce the following rule: A foreign corporation is subject to a sovereignty's jurisdiction whenever one or more of its human representatives is within that sovereignty's territory.

What persons should be considered representative? Should jurisdiction over foreign corporations be determined by the presence of stockholders, directors, agents or servants? Do some or all of these persons represent the corporation?

The acts of stockholders are not representative at all except perhaps while in attendance at stockholder's meetings for the purpose of voting upon some corporate transaction requiring their approval. This is because the corporation is an entity separate and distinct from its stockholders and they have no power to represent or act for it.

The acts of directors likewise are non-representative except at directors' meetings. Since at such times they are agents of the corporation, they may be regarded as included in the term agent.

The acts of agents or servants are not always representative. At times they may act in their capacity as agents or servants. At other times they may act for themselves or for another principal or master. It is only when acting within the scope of their authority on behalf of the corporation that their physical presence can be said to represent the corporate entity. A sovereignty does not acquire jurisdiction over a foreign corporation by reason of the presence of an officer or agent who is not acting or doing business for it.⁶

⁶ *Newell v. The Great Western Railway Co.* (1869) 19 Mich. 336; *St. Clair v. Cox* (1882) 106 U. S. 350; *Kendall v. American Automatic Loom Co.* (1904) 198 U. S. 477; *Lumiere v. Wilder Inc.* (1922) 261 U. S. 174; *Rust v. United Water Works Co. Ltd.* (C. C. A. 8, 1895) 70 F. 129; *Reifsnider v. American Imp. Pub. Co.* (C. C. Minn. 1891) 45 F. 433; *Bentlif v. London & Colonial Finance Corp. Ltd.* (C. C. S. D. N. Y. 1890) 44 F. 667; *St. Louis Wire Mill Co. v. Consolidated Barb-Wire Co.* (C. C. E. D. Mo. 1887) 32 F. 802. Due process requires this result. *Riverside Mills v. Menefee* (1914) 237 U. S. 189. In

Having considered what classes of persons represent the corporation, the suggested rule may be given a more definite form as follows: A foreign corporation is subject to a sovereignty's jurisdiction whenever one or more of its agents or servants, acting in its behalf, is within that sovereignty's territory.⁷

The purpose of this paper is to offer this rule as a solution of the problem of jurisdiction over foreign corporations. The remaining pages are devoted to an examination of the decisions of the federal courts. These are classified and scrutinized with a view to determining whether or not the proposed rule is applicable.

II. DOCTRINES OF THE SUPREME COURT

1. EARLY CASES.

The first case to come before the United States Supreme Court in which it was necessary to decide whether or not a state had jurisdiction over a foreign corporation was *Lafayette Insurance Co.*

Golday v. Morning News (1894) 156 U. S. 518, service was on the president while "temporarily" in the state. In *Moulin v. Insurance Co.* (1853) 24 N. J. Law 222 service was on the president while "accidentally" within the state. Whether or not the president was acting for the corporation while in the state does not appear in either case.

Service on an agent or servant who is not acting or doing business for the corporation will be valid if the sovereignty has jurisdiction by reason of the presence of other agents or servants acting or doing business for it. *Pennsylvania Lumberman's Mutual Fire Insurance Co. v. Meyer* (1905) 197 U. S. 407; *Cone v. Tuscaloosa Mfg. Co.* (C. C. S. D. N. Y. 1896) 76 F. 891.

⁷ See Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, (1917) 30 Harv. L. Rev. 676, 684, 688, 695. Cf. *Bank of America v. Whitney Central National Bank* (1923) 261 U. S. 171, criticised in comment (1925) 20 Ill. L. Rev. 281, 284.

The rule should be used only in determining whether or not a sovereignty has power. A state may not have exercised its power. Thus a Colorado statute providing for service upon foreign corporations applied only to those having an office in the state. *Cooper Mfg. Co. v. Ferguson* (1885) 113 U. S. 727. Many statutes providing for service upon foreign corporations provide for service upon certain designated officers. These have been interpreted as prohibiting service upon other agents and servants of the corporation. The service is invalid because service upon an agent or servant of that class is prohibited by the statute. *Boardman v. S. S. McClure Co.* (C. C. Minn. 1903) 123 F. 614 (traveling advertising solicitor not a "managing agent"); *Doe v. Springfield Boiler & Mfg. Co.* (C. C. A. 9, 1900) 104 F. 684 (commission broker not a "business agent"); *Frankel v. Dover Mfg. Co.* (Sup. Ct., App. Div., 1907) 104 N. Y. S. 459 (salesman not a "managing agent"); *Higgs v. Sperry* (1905) 139 N. C. 299, 51 S. E. 1020 (traveling auditor not a "local agent"). The state has not exercised its full power.

v. French.⁸ An insurance company incorporated in Indiana had a local agent in Cincinnati. The agent issued a policy to residents of Ohio insuring Ohio property against fire. The corporation was sued on the policy in a state court in Ohio, process being served on the agent pursuant to an Ohio statute. A judgment was entered against the corporation. The judgment was sued on in the United States Circuit Court in Indiana, where a judgment was entered against the corporation on the ground that the Ohio judgment was entitled to full faith and credit. The question was whether Ohio had jurisdiction or power over the Indiana corporation. The Supreme Court held that it had.

The opinion first reaffirms Chief Justice Taney's dictum in *Bank of Augusta v. Earle* that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."⁹ Justice Curtis then stated that the corporation could have entered an appearance in the Ohio suit. He then made this astonishing statement: "The inquiry is not whether the defendant was personally within the state but whether he or some one authorized to act for him in reference to the suit had notice and appeared; or if he did not appear, whether he was bound to appear or suffer a judgment by default."¹⁰ It would seem that whether or not the corporation was "bound to appear" would depend upon whether it was personally within the state and the real question would become when is a corporation "personally" within a state. Taney's dictum prevented this analysis. The court's statement as well as the entire opinion seems to be the result of a desire to reach a result logically prohibited by Taney's dictum without disturbing what, though mere obiter, was regarded as law.

Justice Curtis recognized that no appearance had been entered. He said that the corporation was "bound to appear" because Ohio's consent to the transaction of business in its territory was conditioned on the assent of the corporation to Ohio's jurisdiction.

⁸ (1855) 18 How. 404.

⁹ (1839) 13 Pet. 519, 588. See Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918) Ch. II.

¹⁰ (1855) 18 How. 404, 407.

There are two fallacies in this reasoning. One is that it assumes that Ohio could impose any sort of condition, even one subjecting to its jurisdiction persons who never came within its borders. The Supreme Court subsequently adopted the doctrine that a state could not impose unconstitutional conditions upon a foreign corporation as the price of its permission to transact business within its territory.¹¹ Neither can it impose conditions which are contrary to the basic principle of jurisdiction. A sovereignty or state except for its own citizens has no power over persons located outside of its own territory. It cannot give itself power over such persons by enacting a statute imposing a condition. It cannot lift itself by its own boot straps. Having no power the statute has no application beyond its own boundaries.¹² The basic principle of jurisdiction is a principle of international law. It is fundamental law. Statutes are invalid in so far as they are contrary to it. If a sovereignty could extend its power by statute, all jurisdictional limitations would soon disappear.

The other fallacy lies in the notion that Ohio obtained jurisdiction by the consent of the foreign corporation. There was neither actual nor implied consent. The corporation had no actual intention of subjecting itself to Ohio's jurisdiction. Neither can the doing of business in Ohio be said to manifest such an intention. To be sure the doing of business in Ohio was a voluntary act, but as the condition was one which Ohio could not impose, consent to the condition cannot be implied from the doing of the act. Attributing consent to the corporation is a mere fiction indulged in by the court for the purpose of accomplishing the desired result.

¹¹ *Western Union Telegraph Co. v. Kansas* (1910) 216 U. S. 1; *Pullman Co. v. Kansas* (1910) 216 U. S. 56; *Ludwig v. Western Union Telegraph Co.* (1910) 216 U. S. 146. See Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918) Ch. VIII.

¹² In *Sirdar Gurdial Singh v. Rajah of Faridkote* (1894) A. C. 670, 683 the Earl of Selborne said, "All jurisdiction is properly territorial, and 'extra territorium jus dicenti, impune non paretur'. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. . . . As between different provinces under one sovereignty . . . the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign court ought to recognize against foreigners, who owe no allegiance or obedience to the power which so legislates."

This consent doctrine is stated by Justice Curtis in the following language: "Now when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them."¹³ The act which was held to amount to consent was not the doing of business, but doing it through an agent located in Ohio. Thus the test of jurisdiction presented by the case is the presence of an agent acting for the corporation.

The next case to come before the United States Supreme Court was *St. Clair v. Cox*¹⁴ decided twenty-seven years later. In this case the exclusion of a certified copy of a judgment which the defendant had offered in evidence was assigned as error. The judgment had been obtained in a Michigan court against an Illinois corporation. The sheriff's return recited that the writ had been served "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county." The trial court's refusal to admit the certified copy of the judgment in evidence was sustained on the ground that it did not appear that the agent was acting in his representative capacity, that is for the corporation while he was in Michigan. In this connection the court said, " . . . service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the state. This representation implies that the corporation does business, or has business in the state for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the state, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force."¹⁵

This case was followed by *Société Foncière v. Milliken*.¹⁶ A corporation organized under the laws of France for the purpose of developing real estate in Texas was sued in Texas. Process was served upon an agent who had charge of its affairs in Texas. The Supreme Court held that the service was valid. Justice Brewer in his opinion relied on *Angerhoefer v. Bradstreet Co.*¹⁷ decided by the Circuit Court for the Eastern District of Texas. That

¹³ (1855) 18 How. 404, 408.

¹⁶ (1890) 135 U. S. 304.

¹⁴ (1882) 106 U. S. 350.

¹⁷ (C. C. E. D. Tex. 1884) 22 F. 305.

¹⁵ (1882) 106 U. S. 350, 359.

court per Sabin, J. said, "Service upon a corporation which is present, although not a citizen or resident of the state or county, if made upon the local agent representing such company in the county where the suit is brought, *the company is present in the agent* and service upon the agent is personal service on the company. The company may be a non-resident of the county or state, yet if it comes into a county or state and establishes a local agent for the transaction of its business, it is there present for all the purposes of its business and for all purposes of suit."¹⁸

The subsequent cases of *Goldey v. Morning News*¹⁹ and *Conley v. Mathieson Alkali Works*²⁰ were like *St. Clair v. Cox*. In them as in *St. Clair v. Cox* the phrase "doing business" was used in connection with the agent for the purpose of determining whether or not he was representing the corporation at the time of service. Later cases relying on these seized upon the phrase "doing business" as the test of jurisdiction.²¹ Thus, the idea that jurisdiction over foreign corporations depended upon the presence of agents representing the corporation was obscured.

2. THE CONSENT DOCTRINE

The fallacies of the consent doctrine were exposed in connection with the discussion of *Lafayette Insurance Co. v. French*, *supra*. No attempt will be made here to trace the doctrine through the cases. That work has already been well done by others.²² There is one type of case, however, where it cannot be said that the consent of the corporation is a mere fiction. Where a statute requires that foreign corporations before doing business in the state shall appoint an agent in the state to receive service of process and the corporation actually appoints such an agent it would seem that the corporation actually consents to submit itself to the state's jurisdiction. In *Pennsylvania Fire Insurance Co. v. Gold*

¹⁸ Italics the author's.

¹⁹ (1894) 156 U. S. 518.

²⁰ (1903) 190 U. S. 406.

²¹ *Connecticut Mutual Life Insurance Co. v. Spratley* (1898) 172 U. S. 603, 610; *Mutual Reserve Fund Life Association v. Phelps* (1903) 190 U. S. 147, 157.

²² See Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918) Ch. V; Scott, *Business Jurisdiction over Nonresidents*, (1919) 32 Harv. Law Rev. 872, 879; Cahill, *Jurisdiction over Foreign Corporations*, (1917) 30 Harv. Law Rev. 676, 692.

Issue Mining Co.,²³ Justice Holmes recognized that in the usual case where the foreign corporation has not complied with the statute consent was a mere fiction. However, he held that where the service was upon an agent "voluntarily" appointed by the corporation to receive such service the consent was actual so as to subject it to the state's jurisdiction upon a foreign cause of action. He distinguished the cases where the Supreme Court reached the opposite result, *Old Wayne Mutual Life Association v. McDonough*²⁴ and *Simon v. Southern Railway Co.*,²⁵ on the ground that there was no actual consent in those cases.

This jurisdiction by actual consent is seemingly analogous to the jurisdiction obtained by actual consent where there has been an entry of appearance. There is, however, an important difference between the two. An entry of appearance is a voluntary act. The appointment of an agent to receive service of process is not voluntary. It is induced by the belief that the state has power to require it. As has already been pointed out, a state has no power to enact a statute imposing a condition which will give it power over persons who never come into its territory. The consent is conditioned on the states power to require it and can have no effect when that power does not exist. In three recent cases the United States Supreme Court has held that such consent does not subject the foreign corporation to the state's jurisdiction when no business is done within the state.²⁶ It is difficult to see how the consent doctrine can flourish after these decisions.²⁷

²³ (1917) 243 U. S. 93.

²⁴ (1907) 204 U. S. 8.

²⁵ (1915) 236 U. S. 115.

²⁶ *Chipman Ltd. v. Jeffery Co.* (1920) 251 U. S. 373; *Mitchell Furniture Co. v. Selden Breck Co.* (1921) 257 U. S. 213; *Morris & Co. v. Skandinavia Insurance Co.* (1929) 279 U. S. 405.

²⁷ In *Hess v. Pawlowski* (1927) 274 U. S. 352, the United States Supreme Court applied the doctrine to individuals. A Massachusetts statute provided that the operation of an automobile in the state by a non-resident should be deemed equivalent to the appointment by him of the registrar as his agent upon whom process might be served in causes of action arising out of its operation in the state. The statute required the plaintiff to send a copy of the process to the defendant by registered mail. Hess, a non-resident, who was not in Massachusetts at the time suit was filed was served in the manner required by the statute. The Supreme Court sustained the jurisdiction of Massachusetts and the validity of the statute. Justice Butler reasoned that the regulation of the use of the highways was a valid exercise of the police power, that Massachusetts could exclude individuals until they complied with

3. THE PRESENCE DOCTRINE

The theory of the presence doctrine is that the foreign corporation is actually present where it is doing business. It is subject to the jurisdiction of every sovereignty within whose territory it does business because it is "present" there. This doctrine first appeared in a case decided by the New Jersey Supreme Court in 1853²⁸ prior to the Supreme Court's adoption of the consent doctrine in *Lafayette Insurance Co. v. French*. The first United States Supreme Court decision in which it appears is *St. Louis Southwestern Railway v. Alexander*²⁹ decided in 1913. Subsequent decisions of the same court adopt it.³⁰

the statute and "having no power to exclude, the state may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as the agent on whom process may be served."

This is the old argument repeatedly condemned by the United States Supreme Court itself that the state having the power to exclude may impose any condition as the price of its permission to enter. Furthermore the defendant did not actually consent to the state's jurisdiction. The consent is implied. It is fictitious. The court relied on *Lafayette Insurance Co. v. French*, supra and *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*, supra.

Justice Butler also relied on *Kane v. New Jersey*, (1916) 242 U. S. 160, where a New Jersey statute providing that non-residents operating an automobile in the state must appoint the Secretary of State as their agent to receive service of process in causes of action arising out of its operation in the state was upheld. The defendant in that case was arrested while actually in the state. The state clearly had power or jurisdiction over him. The statute was held to be a reasonable exercise of the police power and not contrary to the equal protection of the laws clause because not discriminatory and therefore constitutional. The question of jurisdiction over non-residents not within the state when served was not discussed.

The decision is sound not because of the reasons given in support of it, but because Hess was in Massachusetts territory at the time of the accident and therefore subject to its laws. The statute applied to him and he was bound by it. Had Hess never gone into Massachusetts, jurisdiction over him could not have been acquired by a statute providing for service on an agent. *Flexner v. Farson* (1919) 248 U. S. 289.

The case is in accord with the cases sustaining jurisdiction over a foreign corporation acquired by service pursuant to a state statute specifically providing that foreign corporations doing business in the state are subject to suit on causes of action arising there after the corporation has ceased to do business there. See note 45b post.

²⁸ *Moulin v. Trenton Mutual Life and Fire Insurance Co.* (1855) 25 N. J. L. 57. Same case (1853) 24 N. J. L. (4 Zabr.) 222.

²⁹ (1913) 227 U. S. 218, 226.

³⁰ *People's Tobacco Co. v. American Tobacco Co.* (1918) 246 U. S. 79, 84, 87; *Bank of America v. Whitney Bank* (1923) 261 U. S. 171, 173; *Louisville & Nashville Railroad Co. v. Chatters* (1928) 279 U. S. 320, 324.

4. FOREIGN CAUSES OF ACTION

If the sovereignty has jurisdiction over the foreign corporation there is no reason why suit may not be brought against it on transitory causes of action no matter where they arise. In this respect a corporation is not different from an individual. Many cases so hold.³¹ However, the position of the United States Supreme Court on this question is not at all clear.

In *Barrow Steamship Co. v. Kane*³² suit to recover for a personal injury alleged to have been suffered by plaintiff while on board a lighter off the coast of Ireland was brought in the Circuit Court of the United States for the Southern District of New York against a British corporation. The court held that the Circuit Court had jurisdiction over the foreign corporation because it was "doing business" in the District and that the cause of action "might be maintained in any Circuit Court of the United States which acquired jurisdiction of the defendant."

In *Old Wayne Life Assn. v. McDonough*³³ and *Simon v. Southern Railway Co.*³⁴ foreign corporations had not complied with a state statute authorizing foreign corporations to do business in the state but were nevertheless engaging in business there. They were sued there on foreign causes of action. Process was served on a state official designated by the statute. The court held that in the absence of consent the state had jurisdiction only as to causes of action arising therein for the reason that consent to be subject to the state's jurisdiction could be implied only to that extent.³⁵

In *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*³⁶

³¹ *Johnston v. Trade Insurance Co.* (1882) 132 Mass. 432; *Logan v. Bank of Scotland* (1904) 2 K. B. 495; *Barrow Steamship Co. v. Kane* (1898) 170 U. S. 100; *Owen v. Power Co.* (1916) 78 W. Va. 596, 89 S. E. 262; *Tauza v. Susquehanna Coal Co.* (1917) 220 N. Y. 259, 115 N. E. 915; *Massachusetts Bonding & Insurance Co. v. Concrete Steel Bridge Co.* (C. C. A. 4, 1930) 37 F. (2d) 695; *Haggin v. Comptoir D'Escompte de Paris* (1904) 23 Q. B. D. 519; *La Bourgogne* (1899) A. C. 321.

³² (1898) 170 U. S. 100.

³³ (1907) 204 U. S. 8.

³⁴ (1915) 236 U. S. 115.

³⁵ Dicta to the same effect as the court's holding in the *Old Wayne* and *Simon* cases may be found in subsequent decisions. *Morris & Co. v. Skandinavia Insurance Co.* (1929) 279 U. S. 405, 408; *Louisville & Nashville Railroad Co. v. Chatters* (1929) 279 U. S. 320, 325.

³⁶ (1917) 243 U. S. 93.

the facts were the same except that process was served upon an agent who had been appointed by the corporation for that purpose in compliance with the state statute. The court held that the state had jurisdiction on the ground that there was actual consent. The *Old Wayne and Simon* cases were distinguished on the ground that in those cases there was no consent.³⁷ But the consent theory is untenable.

In *Denver & Rio Grande Western Railroad Co. v. Terte, Judge*^{37a} the jurisdiction of a Missouri court over a Kansas corporation was sustained although the cause of action arose in Colorado. The issue is not discussed in the opinion because the corporation relied upon the commerce clause alone to defeat jurisdiction.

The *Old Wayne* and *Simon* decisions are based upon the implied consent doctrine. *St. Louis Southwestern Railway v. Alexander*, the earlier case in which the Supreme Court adopted the presence theory, was not referred to in the *Simon* case. Now that the "presence" theory has been adopted the consent and implied consent theories should offer no obstacle to suit on a foreign cause of action. If the foreign corporate defendant is "present" within the boundaries of the sovereignty when service is made the jurisdiction thus obtained should extend to all transitory causes of action regardless of their origin. In both the *Old Wayne* and *Simon* cases the state statute, pursuant to which service was made upon a state official, did not require the state official to notify the corporation. Judgments were obtained by default without notice to the corporation. The obvious unfairness of such procedure undoubtedly influenced the court. Due process was not argued or mentioned in the court's opinion but there are several cases holding that a statute providing for service upon a public officer but not requiring the public officer or the plaintiff to notify the corporation is unconstitutional.³⁸ The *Old Wayne* and *Simon* decisions should have been put upon this ground.

³⁷ The same distinction was made in *Smolik v. Philadelphia & Reading Coal & Iron Co.* (D. C. S. D. N. Y. 1915) 222 F. 148, and *Bagdon v. Philadelphia & Reading Coal & Iron Co.* (1916) 217 N. Y. 432, 111 N. E. 1075.

^{37a} (1932) 284 U. S. 284.

³⁸ *King Tonopah Mining Co. v. Lynch* (D. C. Nev. 1916) 232 F. 485; *Knapp v. Bullock Tractor Co.* (D. C. S. D. Cal. 1917) 242 F. 543. Cf. *Wuchter v. Pizzutti* (1928) 276 U. S. 13.

III. THE TEST OF JURISDICTION

1. DOING BUSINESS.

The United States Supreme Court's test of jurisdiction under the presence doctrine is the same as it was under the consent doctrine. A foreign corporation is subject to a state's jurisdiction whenever it is doing business within the state's territory. As previously pointed out, this came about through a misunderstanding of the earlier cases in which the test was the presence of an agent doing business (i. e. acting) for the corporation. The change, seemingly immaterial, has proved to be the cause of the greatest uncertainty and confusion. This is because the phrase doing business means different things to different judges. Some limit it to making contracts. Others give it a broader scope. The result is that the term is warped to suit each judge's notion of justice and policy. The United States Supreme Court itself may be found on both sides of every controversial point.

2. ATTEMPTS TO DEFINE.

The United States Supreme Court has from time to time attempted to define doing business. In *St. Louis Southwestern Railway v. Alexander* Justice Brandeis said, "In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served."³⁹ There is nothing definite in this. The lower federal courts have continued to complain.⁴⁰

Justice Day came very close to a solution of the problem in *International Harvester Co. v. Kentucky* when he said, "when a corporation of one state goes into another in order to be regarded as within the latter it must be there by its agents authorized to

³⁹ (1913) 227 U. S. 218, 227. For a similar expression see *Philadelphia & Reading Railway Co. v. McKibbin* (1917) 243 U. S. 264, 265.

⁴⁰ See *Frink Co. v. Erickson* (C. C. A. 1, 1927) 20 F. (2d) 707, 711; *Farmers' & Merchants' Bank v. Federal Reserve Bank* (D. C. E. D. Ky. 1922) 286 F. 566. In *Knapp v. Bullock Tractor Co.* (D. C. S. D. Cal. 1917) 242 F. 543 at p. 549 the court said, "Out of the multitude of authorities cited and which have been examined by the court in the course of its labors, no really satisfactory, comprehensive and scientifically accurate determination of what is necessary, or may be sufficient to constitute 'doing business' in a state has been encountered."

transact its business in that state.”⁴¹ The adoption of the presence of an agent or servant acting for the corporation as the test of jurisdiction is the way out. However, the Supreme Court cannot be said to have adopted this test because in the subsequent case of *People's Tobacco Co. v. American Tobacco Co.*⁴² they held that jurisdiction was not acquired by the presence of agents who were engaged in soliciting, but had no power to contract. Nevertheless Justice Day repeated his formula saying, “The general rule deducible from all our decisions is that the business must be of such a nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted.”⁴³

3. THE TIME ELEMENT

The time element is important in cases where the validity of the service of process on a foreign corporation is in question. In *Golden, Belknap and Swartz v. Connersville Wheel Co.*,⁴⁴ where the foreign corporate defendant had completed a contract for the delivery of motors in the state, two years before suit was filed District Judge Tuttle said:

It must be borne in mind that, in order that proper personal service may be made in a state upon a foreign corporation, it is necessary that such corporation be present in such state at the time of service. As, therefore, the presence of a foreign corporation is manifested only by its carrying on of business there it must appear, in such a case, that the foreign corporation in question was at the very time of the service doing such business in the state where jurisdiction is sought. It may be difficult, as a matter of fact, for a court to determine at just what particular moment a corporation begins to do business in a state, or at what particular instant it ceases to do such business there. This difficulty, however, is one of fact. There is no doubt or uncertainty as to the rule of law applicable. Service cannot be made an instant prior to the time that the corporation actually begins to do business in the state, so as to show its presence there. Neither can service be made an instant after the corporation has ceased to do such business there. So, in this case, if there is anything

⁴¹ (1914) 234 U. S. 579, 583.

⁴³ (1918) 246 U. S. 79, 87.

⁴² (1918) 246 U. S. 79.

⁴⁴ (D. C. E. D. Mich. 1918) 252 F. 904.

doubtful or hazy about the time when the defendant corporation ceased to do business in the state of Michigan it is entirely a difficulty of fact.

It may be urged that if, at some prior date, the foreign corporation did, in fact, do business in the state it is a hardship upon a plaintiff to deprive it of the right to bring suit in the state on a cause of action growing out of such business. No different or greater misfortune, however, results to the plaintiff in such a case than in a case wherein he is seeking to sue a natural person. If the defendant be such a person the plaintiff must obtain service while the defendant is personally within the state in which suit is brought. If he permits the defendant to leave the state before commencing his action he cannot, of course, obtain personal service so long as the defendant remains absent from the jurisdiction of the court.⁴⁵

Thus, in effect, the foreign corporation may come and go, enter and withdraw from a sovereignty's territory.

There are a number of Supreme Court and lower federal court decisions holding that a foreign corporation is not subject to suit in a state after it has withdrawn its agents and ceased to do business there.^{45a} This is subject to an exception where the statute specifically provides that foreign corporations doing business in the state may be sued on causes of action arising in the state after they had ceased to do business there by serving a state official and giving notice to the corporation by mail.^{45b} This is because the corporation was subject to the state's power and the statute applied to it when the business was done.^{45c}

The Supreme Court and the lower federal courts have held that when a foreign corporation has occasionally transacted business within a state's territory but is doing no business there at the time

⁴⁵ (D. C. E. D. Mich. 1918) 252 F. 904, 908.

^{45a} *Provident Savings Life Assurance Society v. Kentucky* (1915) 239 U. S. 103; *Hunter v. Mutual Reserve Life Insurance Co.* (1910) 218 U. S. 573; *Mil-lan v. Mutual Reserve Fund Life Ass'n* (C. C. W. D. Va. 1900) 103 F. 764; *Friedman v. Empire Life Insurance Co.* (C. C. Ky. 1899) 101 F. 535.

^{45b} *Bankers' Surety Co. v. Town of Holly* (C. C. A. 8, 1915) 219 F. 96; *Hardy v. Ketchum* (C. C. A. 8, 1895) 67 F. 282; *Western Grocery Co. v. New York Overseas Co.* (D. C. N. D. Cal. 1924) 296 F. 269; *Collier v. Mutual Reserve Fund Life Ass'n* (C. C. W. D. Ark. 1902) 119 F. 617. See *Mutual Reserve Fund Life Ass'n v. Phelps* (1903) 190 U. S. 147. See also cases collected in note (1926) 45 A. L. R. 1447.

^{45c} See note 27 *supra*.

of service jurisdiction is not acquired.⁴⁶ If this is so, it would seem that the foreign corporation would be subject to a state's jurisdiction when it was transacting business in the state at the time of service even though that business was but a single and exceptional transaction. An individual served with process while temporarily in the state would be subject to its jurisdiction. If the test were the presence of an agent acting for the corporation at the time of service, the courts would have little difficulty in reaching this result. However, the authorities including decisions of the Supreme Court are divided on the point. In numerous cases where an officer or agent of a foreign corporation has come into a sovereignty to negotiate the settlement of a claim⁴⁷ or for other corporate purposes⁴⁸ and has been served with proc-

⁴⁶ *Toledo Railways & Light Co. v. Hill* (1917) 244 U. S. 49, (office to pay bond interest maintained five years before suit filed); *Hunter v. Mutual Reserve Life Insurance Co.* (1910) 218 U. S. 573, (several claims adjusted subsequent to the time of service); *Kendall v. American Automatic Loom Co.* (1905) 198 U. S. 477 (directors met within the state but had not done so for three years); *Conley v. Mathieson Alkali Works* (1903) 190 U. S. 406 (directors met within state two or three times but were not meeting at the time of service); *Golden, Belknap & Swartz v. Connersville Wheel Co.* (D. C. E. D. Mich. 1918) 252 F. 904 (contract for the delivery of motors completed two years before); *Buffalo Sandstone Brick Co. v. American Sandstone Brick Machinery Co.* (C. C. W. D. N. Y. 1905) 141 F. 211 (installation of machinery completed before the time of service); *Honeyman v. Colorado Fuel & Iron Co.* (C. C. E. D. N. Y. 1904) 133 F. 96 (infrequent meetings of directors within the state—no evidence as to when meetings were held).

⁴⁷ *Commercial Mutual Accident Co. v. Davis* (1908) 213 U. S. 245; *Connecticut Mutual Life Insurance Co. v. Spratley* (1898) 172 U. S. 602; *Premo Specialty Mfg. Co. v. Jersey-Creme Co.* (C. C. A. 9, 1912) 200 F. 352; *Dungan Hood & Co. v. Bally Ltd.* (D. C. E. D. Pa. 1921) 271 F. 517; *Brush Creek Coal & Mining Co. v. Morgan-Gardner Electric Co.* (C. C. W. D. Mo. 1905) 136 F. 505; *Houston v. Filer & Stowell Co.* (C. C. N. D. Ill. 1898) 85 F. 757.

⁴⁸ *McCord Lumber Co. v. Doyle* (C. C. A. 8, 1899) 97 F. 22; *Beach v. Kerr Turbine Co.* (D. C. N. D. Ohio 1917) 243 F. 706; *Nickerson v. Warren City Tank & Boiler Co.* (D. C. E. D. Pa. 1915) 223 F. 843; *New Haven Pulp & Board Co. v. Downington Mfg. Co.* (C. C. Conn. 1904) 130 F. 605. In the second of these cases Judge Westenhaver said, p. 711, "It is true, we are dealing only with a single contract of sale; but the terms thereof required the foreign corporation to come into the state with its agents and employees and perform certain acts—in other words to do business." In the third case at p. 847 the court said, "Its tangible presence here could only be made manifest in the persons of those who were here acting for it." In the fourth case the court said, p. 607, "Was the agent in New Haven on business of his corporation when the papers in this suit were placed in his hands?" and p. 608, "It is impossible to assent to the proposition that doing business within a state means a persistent or continuous condition of doing or offering to do business,

ess while there jurisdiction has been sustained although no other business was done by the corporation within that sovereignty's territory. The leading case for this view is *Commercial Mutual Accident Co. v. Davis*⁴⁹ where the Supreme Court held that jurisdiction was acquired by serving an agent who came into the state for the purpose of settling a claim.

A slightly larger number of cases hold that jurisdiction is not acquired by serving an officer or agent temporarily in the state although he is actively engaged in corporate business at the time of service.⁵⁰ This line of cases originated with a New Jersey case,

usually leading to the appointment of an agent or the establishment of an office in the state."

⁴⁹ (1908) 213 U. S. 245.

⁵⁰ *Moore Dry Goods Co. v. Commercial Industrial Co. Ltd.* (C. C. A. 9, 1922) 282 F. 21; *Duke v. Pioneer Mining & Ditch Co.* (D. C. W. D. Wash. 1922) 280 F. 883; *Day & Co. v. Schiff, Lang & Co.* (D. C. S. D. N. Y. 1921) 278 F. 533; *Cody Motors Co. v. Warren Motor Car Co.* (D. C. S. D. N. Y. 1912) 196 F. 254; *Noel Construction Co. v. Smith & Co.* (C. C. Md. 1911) 193 F. 492; *Wilkins v. Queen City Savings Bank & Trust Co.* (C. C. S. D. N. Y. 1907) 154 F. 173; *Case v. Smith Lineaweaver & Co.* (C. C. E. D. N. Y. 1907) 152 F. 730; *Buffalo Glass Co. v. Manufacturers' Glass Co.* (C. C. W. D. N. Y. 1905) 142 F. 273; *Buffalo Sandstone Brick Co. v. American Sandstone Brick Co.* (C. C. W. D. N. Y. 1905) 141 F. 211; *Louden Machinery Co. v. American Malleable Iron Co.* (C. C. S. D. Ia. 1904) 127 F. 1008; *United States Graphite Co. v. Pacific Graphite Co.* (C. C. E. D. Mich. 1895) 68 F. 442; *Clews v. Woodstock Iron Co.* (C. C. S. D. N. Y. 1890) 44 F. 31; *St. Louis Wire-Mill Co. v. Consolidated Barb Wire Co.* (C. C. E. D. Mo. 1887) 32 F. 802; *Carpenter v. Westinghouse Air-Brake Co.* (C. C. S. D. Ia. 1887) 32 F. 434; *Good Hope Co. v. Railway Barb Fencing Co.* (C. C. S. D. N. Y. 1884) 22 F. 635.

In *Lumiere v. Wilder Inc.* (1922) 261 U. S. 174, the president of the foreign corporate defendant was served with process while he was within the district but he was not there on business for the corporation. The service was held invalid. Justice Brandeis said, "That jurisdiction over a corporation cannot be acquired in a district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein even if he is there on business of the company, has been settled." This is pure dictum. In *James Dickinson Farm Mortgage Co. v. Harry* (1927) 273 U. S. 119, the jurisdictional question was raised by a plea in abatement and decided on a demurrer to the replication. According to Justice Brandeis's statement of the case the parties thereby admitted that defendant's president was in Illinois on corporate business at the time of service and that the corporation had not engaged in or carried on business in the state. It would seem that if the president was engaged in corporate business in the state the corporation must have been doing business there. Justice Brandeis said, "Jurisdiction over a corporation of one state cannot be acquired in another state or district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the company." If plaintiff admitted that the corporation was not doing business in Illinois this is pure dictum. If plaintiff made no

*Moulin v. Trenton Mutual Life and Fire Insurance Co.*⁵¹ where the foreign corporation's president was served while "accidentally" in the state. Whether or not he was acting for the corporation while there cannot be ascertained from the opinion. Until recently the cases were all decisions of the lower federal courts. They frequently cite the Supreme Court's decisions in *St. Clair v. Cox*,⁵² *Goldy v. Morning News*,⁵³ and *Caledonian Coal Co. v. Baker*.⁵⁴ The point in *St. Clair v. Cox* was not that the agent was casually or temporarily in the state, but that it did not appear that he was acting for the corporation while there. In *Goldy v. Morning News* service was on the president while "temporarily" in the state. In *Caledonian Coal Co. v. Baker* service was on the president while "traveling through" the territory of New Mexico. In neither case does it appear that the officer served was engaged in corporate business.

Recently the Supreme Court handed down its decision in *Rosenberg Co. v. Curtis Brown Co.*⁵⁵ The Curtis Brown Co., an Oklahoma corporation, was a small retail dealer in men's furnishings at Tulsa. Its president was served with process while purchasing merchandise for the corporation in New York. Justice Brandeis said, "Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the state."⁵⁶ The Supreme Court's decision to the contrary in *Commercial Mutual Accident Co. v. Davis*⁵⁷ was not cited. It ought to be a sufficient comment

such admission the statement is applicable. However, with the exception of *Rosenburg Co. v. Curtis Brown Co.* (1922) 260 U. S. 516, the cases cited for the statement do not support it.

Where the agent is within the state for the purpose of testifying at a trial the service is invalid because of privilege. *Ladd Metals Co. v. American Mining Co.* (C. C. Ore. 1907) 152 F. 1008. Cf. *Dungan Hood & Co. v. Bally Ltd.* (D. C. E. D. Pa. 1921) 271 F. 517. The service will be invalid if the agent is fraudulently induced to enter the state. *Stewart v. Nebraska Tire & Rubber Co.* (C. C. A. 8, 1930) 39 F. (2d) 309 cert. den. (1931) 282 U. S. 840; *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.* (C. C. M. D. Pa. 1903) 124 F. 259; *William Grace Co. v. Martin Brick Machine Mfg. Co.* (C. C. A. 7, 1909) 174 F. 131.

⁵¹ (1853) 24 N. J. L. 222. Same case (1855) 25 N. J. L. (1 Dutch) 57.

⁵² (1882) 106 U. S. 350.

⁵³ (1894) 156 U. S. 518.

⁵⁴ (1904) 196 U. S. 432.

⁵⁵ (1922) 260 U. S. 516.

⁵⁶ (1922) 260 U. S. 516, 518.

⁵⁷ (1908) 213 U. S. 245.

on this case to observe that had the defendant been an individual, even "a small retail dealer," jurisdiction would be acquired by personal service in New York.

Statements may be found in some of these cases that single, isolated or occasional transactions do not constitute such a doing of business as to subject a foreign corporation to a sovereignty's jurisdiction and that there must be some substantial business done or a series of transactions.⁵⁸ In cases involving the power of a state to penalize a foreign corporation for failure to comply with a statute the Supreme Court has held that a single transaction is sufficient to subject the corporation to the state's power. This subject is treated in a subsequent paragraph.⁵⁹

4. THE PART TIME AGENT.

The following propositions applicable to cases involving the validity of service have been established: (1) Doing business in a state does not subject a foreign corporation to its jurisdiction if no business is being done at the time of service.⁶⁰ (2) The mere presence of an agent in a state will not subject a foreign corporation to its jurisdiction if he is not acting for or representing it while in the state.⁶¹ It would seem to follow that where a part time agent is the only representative of the foreign corporation in the state, jurisdiction will be acquired by service on the agent while he is acting for the corporation. If he is not acting for it at the time of service, jurisdiction will not be acquired. This would be clearer if the test were the presence of an agent or servant acting for the corporation at the time of service. In cases where a foreign insurance corporation obtains business through a local insurance broker or occasionally employs a physician to make an examination it has been held that jurisdiction was not obtained

⁵⁸ *St. Louis Wire-Mill Co. v. Consolidated Barb Wire Co.* (C. C. E. D. Mo. 1887) 32 F. 802, 805 erroneously relying on *United States v. American Bell Telephone Co.* (C. C. S. D. Ohio 1886) 29 F. 17; *Clews v. Woodstock Iron Co.* (C. C. S. D. N. Y. 1890) 44 F. 31; *Louden Machinery Co. v. American Malleable Co.* (C. C. S. D. Ia. 1904) 127 F. 1008 relying in part on *Cooper Mfg. Co. v. Ferguson* (1885) 113 U. S. 727, in which the court was considering a statute which authorized service on foreign corporations maintaining an office in the state and on *Doe v. Springfield Boiler & Mfg. Co.* (C. C. A. 9, 1900) 104 F. 684 the point of which was that the person served was not a "business agent" as required by the statute.

⁵⁹ Post note 106.

⁶⁰ Supra notes 44, 45, and 46.

⁶¹ Supra note 6.

by serving the broker⁶² or the physician.⁶³ In these cases the broker or the physician was not acting for the corporation at the time of service.⁶⁴

5. THE CORPORATE AGENT

Will doing business through another corporation subject a foreign corporation to a sovereignty's jurisdiction? Here again the solution of the problem would be easier if the test were the presence of an agent acting for the corporation at the time of service. It would then merely be a question of whether or not an agent or servant of the corporate agent was acting for the foreign corporation at the time of service.

The first question is whether or not the corporation doing business in the state is in fact an agent of the foreign corporation. A foreign corporation's mere ownership of a controlling interest in the stock of a subsidiary corporation doing business in the state will not constitute the subsidiary its agent or subject it to the state's jurisdiction.⁶⁵ Nor will the added circumstance that the

⁶² *Hussey Tie Co. v. Knickerbocker Insurance Co.* (C. C. A. 8, 1927) 20 F. (2d), 892; *Doe v. Springfield Boiler & Mfg. Co.* (C. C. A. 9, 1900) 104 F. 684; *Romaine v. Union Insurance Co.* (C. C. W. D. Tenn. 1893) 55 F. 751. In *In re Hohorst* (1893) 150 U. S. 653, service was on the head of a partnership which was the monetary and fiscal agent of a foreign steamship corporation. It does not appear whether or not the partnership was also agent for other steamship companies or whether or not it was acting for the defendant at the time of service. Held: that the service was valid.

⁶³ *Baldwin v. Iowa State Traveling Men's Assn.* (C. C. A. 8, 1930) 40 F. (2d) 357, reversed on another ground (1931) 283 U. S. 522; *Rausch v. Commercial Travelers' Mutual Accident Assn. of America* (C. C. A. 8, 1930) 38 F. (2d) 766, 768 cert. den. (1931) 281 U. S. 763; *Higham v. Iowa State Travelers' Assn.* (C. C. W. D. Mo. 1911) 183 F. 845.

⁶⁴ In *Peterson v. Chicago, Rock Island & Pacific Railway* (1906) 205 U. S. 364, through trains were operated in Texas by the Gulf Railroad, a Texas corporation, and in other states by the Chicago, Rock Island & Pacific Railway, an Illinois corporation. The same employees operated the train on both sides of the Texas border. They received a part of their compensation from each corporation. It was held that they were the agents of the Gulf Co. while in Texas and the agents of the Chicago, Rock Island & Pacific Railway outside of Texas and that Texas did not have jurisdiction over the Chicago, Rock Island & Pacific Railway.

⁶⁵ *Conley v. Mathieson Alkali Works* (1903) 190 U. S. 406; *Peterson v. Chicago Rock Island & Pacific Railway Co.* (1906) 205 U. S. 364, 391; *La Varne v. International Paper Co.* (D. C. E. D. S. C. 1929) 37 F. (2d) 141, 144; *Proctor & Gamble Co. v. Newton* (D. C. S. D. N. Y. 1913) 289 F. 1013; *United States v. American Bell Telephone Co.* (C. C. S. D. Ohio 1886) 29 F. 17, 37; *People v. American Bell Telephone Co.* (1889) 117 N. Y. 241, 22 N. E. 1057.

subsidiary purchases and distributes the holding company's products.⁶⁶

If the corporation doing business in the state is in fact the agent of a foreign corporation and is doing business for its principal at the time it is served jurisdiction over the foreign corporation is acquired.⁶⁷ If it is not doing business for the foreign corporation at the time of service, jurisdiction is not acquired.⁶⁸

6. THE RAILROAD CASES.

There are three types of railroad cases. In the first a foreign railroad corporation owning no lines and operating no trains in the sovereignty's territory has executive offices there from which the operation of the road in other sovereignties is directed. If the test were the presence of an agent or servant acting for the corporation at the time of service, there could be no question as to the decision. In *Washington-Virginia Railway v. Real Estate Trust*⁶⁹ the Supreme Court sustained jurisdiction. In *Atchison, T. & S. F. Ry. Co. v. Weeks*⁷⁰ they denied a writ of certiorari to a contrary Circuit Court of Appeals decision.⁷¹

In the second type of case the foreign railroad corporation has no lines and operates no trains within the sovereignty's boundaries, but other railroad companies operating railroads within the sovereignty's territory sell through transportation a part of which is over the lines of the foreign railroad corporation in another sovereignty. The cases uniformly hold that the sover-

⁶⁶ Cannon Mfg. Co. v. Cudahy Packing Co. (1925) 267 U. S. 333.

⁶⁷ Murphy v. Campbell Soup Co. (D. C. Mass. 1930) 40 F. (2d) 671; Cutler v. Cutler-Hammer Mfg. Co. (D. C. Mass. 1920) 266 F. 388; Dobson v. Farbenfabriken of Elberfeld Co. (D. C. E. D. Pa. 1913) 206 F. 125. See also Industrial Research Co. v. General Motors Corp. (D. C. N. D. Ohio 1928) 29 F. (2d) 623; Van Dresser v. Oregon Ry. & Nav. Co. (C. C. Wash. 1891) 48 F. 202; Newcomb v. New York Central & Hudson River Ry. Co. (1904) 182 Mo. 687, 81 S. W. 1069. Cf. Bank of America v. Whitney Central National Bank (1923) 261 U. S. 171, criticized in comment (1925) 20 Ill. L. Rev. 281; Bentley Co. v. Chiveris & Sons Ltd. (D. C. S. D. N. Y. 1913) 215 F. 959.

⁶⁸ Bank of America v. Whitney Central National Bank (1923) 261 U. S. 171; Frink Co. v. Erikson (C. C. A. 1, 1927) 20 F. (2d), 707; Butler Bros. Shoe Co. v. United States Rubber Co. (C. C. A. 8, 1907) 156 F. 1; Carpenter v. Willard Case Lumber Co. (C. C. S. D. Ia. 1908) 158 F. 697; Goepfert v. Compagnie Generale Transatlantique (C. C. E. D. Pa. 1907) 156 F. 196.

⁶⁹ (1914) 238 U. S. 185.

⁷⁰ (1919) 249 U. S. 602.

⁷¹ (C. C. A. 5, 1918) 254 F. 513 reversing (D. C. W. D. Tex. 1918) 248 F. 970.

eignty does not have jurisdiction under these circumstances.⁷² However, the plaintiff in these cases made no showing that the part time corporate agent was selling transportation over the defendant's lines at the time of service.

In the third type of case the foreign railroad corporation has no lines and operates no trains within the sovereignty's territory, but has agents there who devote their full time to inducing shippers to route freight over their lines and prospective passengers to travel by way of their road. There is a conflict in the authorities as to whether or not the sovereignty has jurisdiction over the foreign railroad corporation under these circumstances. In *Green v. Chicago, Burlington and Quincy Railroad Co.*⁷³ the Supreme Court held that the sovereignty did not have jurisdiction. In *St. Louis Southwestern Railway v. Alexander*⁷⁴ and *Louisville and Nashville Railroad Co. v. Chatters*⁷⁵ the Supreme Court reached the opposite result.⁷⁶ It is submitted that this is the better view. *Green v. Chicago, Burlington and Quincy Railroad Co.* could not have been decided as it was if the test had been the presence of an agent or servant acting for the corporation at the time of service.

This problem is complicated by the limitation imposed upon the state's jurisdiction by the commerce clause of the United States Constitution. Jurisdiction cannot be acquired in states where the foreign railroad corporation does not operate trains if the cause of action did not arise within the state because the defense of

⁷² *Philadelphia & Reading Railway Co. v. McKibbin* (1916) 243 U. S. 264; *Peterson v. Chicago, Rock Island & Pacific Railway* (1906) 205 U. S. 364; *Allen v. Yellowstone Park Transportation Co.* (C. C. E. D. Mo. 1907) 154 F. 504.

⁷³ (1907) 205 U. S. 530. Accord: *Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C. A. 7, 1892) 54 F. 420; *Griffin v. Seaboard Air Line Railway Co.* (D. C. W. D. Mo. 1930) 38 F. (2d) 98; *Cancelmo v. Seaboard Air Line Railway* (C. A. of D. C. 1926) 12 F. (2d) 166; *Klabzuba v. Southern Pacific Co.* (D. C. W. D. Wash. 1929) 33 F. (2d) 359; *Graustein v. Rutland R. Co.* (D. C. Mass. 1919) 256 F. 409; *Partola Mfg. Co. v. Norfolk & Western Ry. Co.* (D. C. S. D. N. Y. 1918) 250 F. 273; *West v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C. N. D. 1909) 170 F. 349; *McGuire v. Great Northern Ry. Co.* (C. C. N. D. Ia. 1907) 155 F. 230; *Maxwell v. Atchison, T. & S. F. R. Co.* (C. C. E. D. Mich. 1888) 34 F. 286.

⁷⁴ (1912) 227 U. S. 218.

⁷⁵ (1929) 279 U. S. 320.

⁷⁶ Accord: *Denver & R. G. R. Co. v. Roller* (C. C. A. 9, 1900) 100 F. 738; *Maverick Mills v. Davis* (D. C. Mass. 1923) 294 F. 404; *Block v. Atchison T. & S. F. R. Co.* (C. C. E. D. Mo. 1884) 21 F. 529.

such suits in states where no lines are operated burdens interstate commerce by requiring the absence of employees from their posts.⁷⁷ This principle applies to suits commenced by attachment as well as to actions in personam.⁷⁸ It does not apply when the cause of action arose within the state.⁷⁹

7. "MERE SOLICITATION"

The notion that mere solicitation did not constitute such a doing of business as to subject a foreign corporation to a sovereignty's jurisdiction originated with the Circuit Court for the Eastern District of Michigan in *Maxwell v. Atchison, T. & S. F. R. Co.*⁸⁰ decided in 1888. In *Green v. Chicago, Burlington & Quincy Railroad Co.*, supra, Justice Moody adopted it saying, "The business shown in this case was in substance nothing more than that of solicitation."⁸¹

In *St. Louis Southwestern Railway Co. v. Alexander* a foreign railroad corporation had an office in New York occupied by a "General Eastern Freight and Passenger Agent" and a "Traveling Freight Agent," in other words, soliciting agents. The facts are the same as those in the *Green* case except that the passenger agent received a letter from the plaintiff making a claim and replied acknowledging receipt of it and stating that all claims were handled by the general offices at St. Louis or Tyler, Texas, and that he letter had been forwarded to the St. Louis office. The Supreme Court held that New York had jurisdiction.⁸²

In *International Harvester Co. v. Kentucky*⁸³ the Kentucky business of a foreign corporation was secured through travelling salesmen. No offices, agencies or warehouses were maintained in Kentucky. Orders were filled by shipping into the state from outside warehouses. Contracts made by the salesmen were subject

⁷⁷ *Davis v. Farmers Co-operative Co.* (1923) 262 U. S. 312; *Michigan Central Railroad Co. v. Mix.*, (1929) 278 U. S. 492; *Griffin v. Seaboard Air Line Railway Co.* (D. C. W. D. Mo. 1928) 28 F. (2d) 998, see the same case (D. C. W. D. Mo. 1930) 38 F. (2d) 98; contra *Harris v. American Railway Express (C. A. of D. C. 1926)* 12 F. (2d) 487, cert. den. (1926) 273 U. S. 695.

⁷⁸ *Atchison, Topeka & Santa Fe Railway Co. v. Wells* (1924) 265 U. S. 101.

⁷⁹ *St. Louis, Brownsville & Mexico Railway Co. v. Taylor* (1924) 266 U. S. 200.

⁸⁰ (C. C. E. D. Mich. 1888) 34 F. 286.

⁸¹ (1907) 205 U. S. 530, 533.

⁸² (1912) 227 U. S. 218. See also *Louisville & Nashville Railroad Co. v. Chatters* (1929) 279 U. S. 320.

⁸³ (1914) 234 U. S. 579.

to the approval of the home office, but they had authority to collect accounts. The Supreme Court held that Kentucky had jurisdiction over the corporation even though all of its business was interstate. It was expressly stated that *Green v. Chicago, Burlington & Quincy Railway* was not overruled so that the decision apparently rests on the fact that the salesmen had authority to make collections. Thus Justice Moody's statement in the *Green* case was revived after the *Green* case itself had apparently been laid to rest by the contra decision in *St. Louis Southwestern Railway v. Alexander*.

In *Tauza v. Susquehanna Coal Co.*⁸⁴ a foreign corporation maintained an office in New York for eleven sales agents who had no authority finally to approve contracts. The New York Court of Appeals in an opinion by Judge Cardozo held that New York had jurisdiction over the foreign corporation although the agents had no authority to make collections as had the agents in the *International Harvester Co.* case. It refused to apply the *Green* case.

In spite of these decisions, the Supreme Court in *People's Tobacco Co. v. American Tobacco Co.*⁸⁵ held that Louisiana did not have jurisdiction over a foreign corporation which had agents soliciting business in the state who had no authority finally to approve contracts.

The efforts of the lower federal courts to apply these cases have led to some peculiar results. Several courts thought that the sovereignty should have jurisdiction as to causes of action arising out of the solicitation, but held that there was no jurisdiction as to causes of action not arising out of the solicitation.⁸⁶ In one case a foreign corporation had a resident mechanic in Ohio who travelled about the state servicing machines sold by it. It also employed travelling solicitors without power to conclude contracts who sold the machines. The court held that Ohio had jurisdiction over the corporation because the acts of the mechanic amounted to "doing business" but that the solicitation by the salesmen was not "doing business."⁸⁷ One court applied the doc-

⁸⁴ (1917) 220 N. Y. 259, 115 N. E. 915. See also *Laurentide Co. Ltd. v. Durey* (D. C. N. D. N. Y. 1916) 231 F. 223.

⁸⁵ (1918) 246 U. S. 79.

⁸⁶ *Brown v. Shields & Co.* (D. C. Mass. 1930) 41 F. (2d) 542; *Strain v. Chicago Portrait Co.* (C. C. W. D. Mo. 1903) 126 F. 831.

⁸⁷ *Cone v. New Britain Machine Co.* (C. C. A. 6, 1927) 20 F. (2d) 593 cert. den. (1927) 275 U. S. 552. Cf. *Fawkes v. American Motor Car Sales Co.* (C. C. Minn. 1910) 176 F. 1010.

trine to a purchasing agent whose purchases were subject to the approval of the home office.⁸⁸

There are cases sustaining jurisdiction over a foreign corporation based on the presence of an agent with authority to conclude contracts.⁸⁹ The fact that the agent had authority to make contracts was emphasized, but this was because service was made on the agent and the question was whether or not the agent was a proper person to serve under the statute. In one case it was held that the agent did not come within the class designated by the statute.⁹⁰

It is submitted that the mere solicitation rule is unsound. In cases where the question is whether a foreign corporation is subject to a penalty for failure to comply with a statute requiring foreign corporations to file a copy of their articles of incorporation and pay a fee etc. before doing business within the sovereignty a single act of solicitation by an agent is held sufficient to subject the foreign corporation to the sovereignty's jurisdiction.⁹¹ In a case of this type decided in 1927 Justice Brandeis said, "But the company, a foreign corporation, had no constitutional right to solicit the insurance in Minnesota by means of an agent present within that State. For the act of solicitation there the State might have punished the agent; and also the Company as principal."⁹² The jurisdictional problem in this type of case is the same as in cases involving the validity of service.

Certainly the term "doing business" includes more than the mere making of contracts. Collecting money is not contracting

⁸⁸ *Johanson v. Alaska Treadwell Gold Mining Co.* (D. C. W. D. Wash. 1915) 225 F. 270. Cf. *Meade Fibre Co. v. Varn* (C. C. A. 4, 1925) 3 F. (2d) 520.

⁸⁹ Sales agents: *Palmer v. Chicago Herald Co.* (C. C. S. D. N. Y. 1895) 70 F. 886; *Brewer v. Geo. Knapp & Co.* (C. C. E. D. N. Y. 1897) 82 F. 694; *Irons v. Rogers* (C. C. S. D. N. Y. 1908) 166 F. 781; *Michigan Aluminum Foundry Co. v. Aluminum Castings Co.* (C. C. E. D. Mich. 1911) 190 F. 879. Purchasing agents: *Hunan v. Northern Region Supply Corp.* (D. C. S. D. N. Y. 1920) 262 F. 181. In *Rosenburg Co. v. Curtis Brown Co.* (1922) 260 U. S. 516, the presence of the president of a foreign corporation in New York actively engaged in making purchases was held not to subject the foreign corporation to New York's jurisdiction but the ground was that he was only "temporarily" there. The case is contra to many others cited in notes 47 and 48 supra and note 106 post.

⁹⁰ *Boardman v. S. S. McClure Co.* (C. C. Minn. 1903) 123 F. 614.

⁹¹ *Chattanooga National Building & Loan Assn. v. Denson* (1903) 189 U. S. 408.

⁹² *Bothwell v. Buckbee Mears Co.* (1927) 275 U. S. 274.

yet in *International Harvester Co. v. Kentucky*⁹³ it was held to be doing business so as to subject the corporation to Kentucky's jurisdiction. There are cases holding that the performance of contracts constitutes doing business.⁹⁴

Under the proposed rule the corporation is present while the agent or servant is present and acting for it. The presence of any agent or servant while acting for the corporation in any capacity no matter how humble is equivalent to corporate presence. The extent of the agent's or servant's authority is immaterial.

8. BUSINESS BY MAIL, TELEPHONE AND TELEGRAPH

In *Minnesota Commercial Men's Association v. Benn*⁹⁵ an insurance corporation organized under the laws of Minnesota where its only office was located insured residents of Montana. The business was carried on entirely by mail. The company advertised in Montana. Prospective members applied for insurance by filling out and mailing application blanks supplied by the company. Policies were mailed to approved risks. The policy holders mailed their premiums to the office in Minnesota. Claims were adjusted upon proofs of loss including an attending physician's certificate mailed to the company upon blanks furnished by it. The Supreme Court held that the corporation was not doing business in Montana because the contracts were made in Minnesota. Other courts have reached the same result.⁹⁶

There are also a number of cases holding that a foreign corporation is not doing business in a state after it revokes the authority of its agents and ceases to seek new business there although it continues to collect premiums on existing policies.⁹⁷ Several fed-

⁹³ (1912) 234 U. S. 579.

⁹⁴ *Cone v. New Britain Machine Co.* (C. C. A. 6, 1927) 20 F. (2d) 593 cert. den. (1927) 275 U. S. 552; *Beach v. Kerr Turbine Co.*, (D. C. M. D. Ohio 1917) 243 F. 706; *Nickerson v. Warren City Tank & Boiler Co.* (D. C. E. D. Pa. 1915) 223 F. 843.

⁹⁵ (1922) 261 U. S. 140.

⁹⁶ *Tomlinson v. Iowa State Traveling Men's Assn.* (D. C. W. D. Mo. 1918) 251 F. 171; *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.* (C. C. M. D. Pa. 1903) 124 F. 259; *Pembleton v. Illinois Commercial Men's Assn.* (1919) 289 Ill. 99, 124 N. E. 355. See also *Hazeltine v. Mississippi Valley Fire Insurance Co.* (C. C. W. D. Tenn. 1893) 55 F. 743.

⁹⁷ *Provident Savings Life Assurance Society v. Kentucky* (1915) 239 U. S. 103; *Hunter v. Mutual Reserve Life Insurance Co.* (1910) 218 U. S. 573; *Milan v. Mutual Reserve Fund Life Assn.* (C. C. W. D. Va. 1900) 103 F. 764; *Friedman v. Empire Life Insurance Co.* (C. C. Ky. 1899) 101 F. 535. See also

eral courts have held that making sales by mail, telephone and telegraph and shipping merchandise direct to purchasers in the state is not doing business there.⁹⁸ These decisions were not based on the commerce clause of the United States Constitution. Foreign corporations may be sued in a state in which they are doing business although all of that business is interstate.⁹⁹

However, if the foreign corporation has an agent in the state conducting its affairs¹⁰⁰ or negotiating the settlement of a claim¹⁰¹ or a physician making an examination,¹⁰² it is held to be "doing business" even though most of its business is done by mail.

The Supreme Court seems to be unduly narrowing the meaning of the word business when it declares advertising, the delivery of insurance policies, and the payment of claims not to be doing busi-

Swann v. Mutual Reserve Fund Life Assn. (C. C. Ky. 1900) 100 F. 922; *Compagnie Du Port De Rio De Janeiro v. Mead Morrison Mfg. Co.* (D. C. Me. 1927) 19 F. (2d) 163. *Contra*: *Mutual Reserve Fund Life Assn. v. Tuchfeld* (C. C. A. 6, 1908) 159 F. 833. In *Connecticut Mutual Life Insurance Co. v. Spratley* (1898) 172 U. S. 602, and *Mutual Reserve Fund Life Assn. v. Phelps* (1903) 190 U. S. 147, the Supreme Court said that collecting premiums by mail was "doing business" which subjected the foreign insurance company to the state's jurisdiction, but in both cases there was service on an agent of the corporation who at the time was acting for it within the state. *Chehalis River Lumber & Shingle Co. v. Empire State Surety Co.* (D. C. W. D. Wash. 1913) 206 F. 559 is apparently *contra* but the problem is regarded as solely one of statutory construction.

⁹⁸ *S. B. McMaster v. Chevrolet Motor Co. Inc.* (D. C. E. D. S. C. 1925) 3 F. (2d) 469; *Gottschalk Co. v. Distilling & Cattle Feeding Co.* (C. C. Md. 1892) 50 F. 681.

⁹⁹ *International Harvester Co. v. Kentucky* (1914) 234 U. S. 579.

¹⁰⁰ *Mutual Reserve Fund Life Assn. v. Phelps* (1903) 190 U. S. 147; *International Text Book Co. v. Pigg* (1910) 217 U. S. 91; *Board of Trade v. Hammond Elevator Co.* (1904) 198 U. S. 424; *Midland Linseed Products Co. v. Warren Bros. Co.* (C. C. A. 6, 1925) 46 F. (2d) 870; *Wilson v. Hudson Motor Car Co.* (D. C. Neb. 1928) 28 F. (2d) 347; *Frey & Son Inc. v. Cudahy Packing Co.* (D. C. Md. 1915) 228 F. 209.

¹⁰¹ *Connecticut Mutual Life Insurance Co. v. Spratley* (1898) 172 U. S. 602; *Pennsylvania Lumbermen's Mutual Fire Insurance Co. v. Meyer* (1905) 197 U. S. 407; *Birch v. Mutual Reserve Life Insurance Co.* (1904) 91 App. Div. 384, 86 N. Y. S. 872, *aff'd* 181 N. Y. 583, 200 U. S. 612.

¹⁰² *Commercial Mutual Accident Co. v. Davis*, (1908) 213 U. S. 245. The cases of *Baldwin v. Iowa State Traveling Men's Assn.*, (C. C. A. 8, 1930) 40 F. (2d), 357 reversed on another ground (1931) 283 U. S. 522; *Rausch v. Commercial Travelers' Mutual Accident Assn. of America* (C. C. A. 8, 1930) 38 F. (2d) 766, 768 cert. den. (1930) 281 U. S. 763; *Higham v. Iowa State Travelers' Assn.* (C. C. W. D. Mo. 1911) 183 F. 845 are only apparently *contra* for they are all cases involving the validity of service where the summons was served upon the physician at a time when he was not acting for the corporation.

ness. Truth and accuracy would be better served if it reached the same result on the ground that the corporation had no agent in the state.

IV. JURISDICTION TO PENALIZE FOR FAILURE TO COMPLY WITH STATUTE

Most sovereignties have statutes which require foreign corporations to do certain things, such as file a copy of their articles of incorporation, pay a fee, and appoint a local agent to receive service of process, before doing business in their territory. The statute usually imposes some kind of penalty for non-compliance with its requirements.¹⁰³ In cases where it is sought to impose this penalty upon a foreign corporation the first question is whether or not it was within the sovereignty's jurisdiction for, of course, if it was not the statute does not apply to it. The time element is unimportant in this type of case.¹⁰⁴ The penalty attaches at the time the corporation does the act within the state in violation of the statute.¹⁰⁵ A single act or transaction will subject the corporation to the sovereignty's jurisdiction and the statutory

¹⁰³ There is a conflict in authority as to whether contracts made within the sovereignty in violation of a statute which imposes no penalty are void. The better view is that they are valid. *Boatmen's Bank of St. Louis v. Fritzlen* (C. C. A. 8, 1915) 221 F. 154, 160 cert. den. (1915) 238 U. S. 641; *Blodgett v. Lanyon Zinc Co.* (C. C. A. 8, 1903) 120 F. 893; *Northwestern Mutual Life Insurance Co. v. Overhold* (C. C. Colo. 1878) 18 Fed. Cas. 403. Contra: *Cyclone Mining Co. v. Baker Light & Power Co.* (C. C. Ore. 1908) 165 F. 996; *Semple v. Bank of British Columbia* (C. C. Ore. 1878) 21 Fed. Cas. 1063; *In re Comstock* (D. C. Ore. 1874) 6 Fed. Cas. 244.

¹⁰⁴ In *In re Monongahela Distillery Co.* (D. C. E. D. Mich. 1910) 186 F. 220 the court failed to notice this distinction between the two types of cases. A foreign corporation sold merchandise through a factor located in Michigan without complying with the Michigan statute. The factor became a bankrupt and the failure to comply with the statute was offered as an objection to the allowance of the foreign corporation's petition to reclaim goods. Judge Dennison said that the contracts of sale made by the factor were in law the contracts of the consignor and that it would seem that the corporation was doing business in the state. However, he felt bound by *Butler Bros. Shoe Co. v. U. S. Rubber Co.* (C. C. A. 8, 1907) 156 F. 1 cert. den. (1907) 212 U. S. 577, a case involving the validity of service upon the foreign corporation by serving its local factor in which there was no evidence that the factor was acting for the foreign corporation at the time of service. He therefore held that the corporation was not doing business in Michigan and that Michigan did not have jurisdiction.

¹⁰⁵ *Loomis v. People's Construction Co.* (C. C. A. 6, 1914) 211 F. 453 and cases cited in note 106.

penalty.¹⁰⁶ There are numerous dicta to the effect that single or occasional transactions will not subject the foreign corporation to a sovereignty's jurisdiction.¹⁰⁷ These originated with *Cooper Manufacturing Co. v. Ferguson*¹⁰⁸ where the statute required foreign corporations to maintain an office within the state. It would be unreasonable to assume that the legislature intended that this type of statute apply to occasional transactions.¹⁰⁹ The expense of maintaining an office would be too great in proportion to the business done. The state has jurisdiction, but the statute does not apply.

There are other non-jurisdictional reasons why the statute may not apply. In the United States the business which is done with-

¹⁰⁶ *Chattanooga National Building & Loan Assn. v. Denson* (1903) 189 U. S. 408; *Interstate Amusement Co. v. Albert* (1916) 239 U. S. 560; *Kansas City Structural Steel Co. v. Arkansas* (1925) 269 U. S. 148; *Bothwell v. Buckbee Mears Co.* (1927) 275 U. S. 274; *Oakland Sugar Mill Co. v. Fred W. Wolfe Co.* (C. C. A. 6, 1902) 118 F. 239. Contra: *Empire Milling & Mining Co. v. Tombstone Mill & Mining Co.* (C. C. Conn. 1900) 100 F. 910.

In *Phillips Co. v. Everett* (C. C. A. 6, 1919) 262 F. 341 cert. den. (1920) 252 U. S. 579, a foreign corporation contracted to install a sprinkler system in a Michigan factory. The work was done and the material furnished by independent subcontractors, but the foreign corporation as general contractor exercised general supervision over the work. The court held that Michigan had jurisdiction over the foreign corporation on the ground that for this purpose the subcontractors could not be considered as independent contractors. It does not appear that the foreign corporation had agents in Michigan, but since it is difficult to see how it could exercise general supervision without having agents there to inspect the work the case can probably be supported on this ground. In *Toledo Traction Light & Power Co. v. Smith* (D. C. N. D. Ohio 1913) 205 F. 643 it was held that a Maine corporation owning a majority of the stock of an Ohio corporation did not subject itself to Ohio's jurisdiction by voting the stock. It does not appear where the meetings were held but as they probably were held in Ohio the soundness of the decision may well be doubted. Decisions to the effect that the mere holding of stock in a domestic corporation will not subject a foreign corporation to a sovereignty's jurisdiction are not authority for this decision.

¹⁰⁷ *Ammons v. Brunswick-Balke Collender Co.* (C. C. A. 8, 1905) 141 F. 570 decided on this ground although the transaction was interstate; *Kirven v. Virginia Carolina Chemical Co.* (C. C. A. 4, 1906) 145 F. 288; *Bruner v. Kansas Moline Plow Co.* (C. C. A. 8, 1909) 168 F. 218 decided on this ground although the transaction was interstate; *Natural Carbon Point Co. v. Bredel Co.* (C. C. A. 7, 1911) 193 F. 897; *Vulcan Steam Shovel Co. v. Flanders* (D. C. E. D. Mich. 1913) 205 F. 102.

¹⁰⁸ (1885) 113 U. S. 727.

¹⁰⁹ *Delaware & Hudson Canal Co. v. Mahlenbrock* (1899) 63 N. J. Law 281. But even this type of statute has been interpreted to apply to single or occasional transactions. *Chattanooga National Building & Loan Assn. v. Denson* (1903) 189 U. S. 408.

in a state's territory may be interstate or foreign commerce. The state has jurisdiction over foreign corporations whose business within its territory is solely of this character for the corporation can be sued there, and statutes requiring the appointment of a local agent to receive service of process are not contrary to the commerce clause of the United States Constitution.¹¹⁰ However, interstate and foreign commerce is burdened by statutes requiring the payment of a fee or the filing of articles of incorporation.¹¹¹

A provision penalizing foreign corporations violating the statute by making its contracts void or unenforceable is common.¹¹² A provision voiding such contracts does not apply to those made outside the sovereignty's territory¹¹³ or creating or transferring an interest in land situated beyond its borders.¹¹⁴ This is because of the conflict of laws rule that the essential validity of a contract depends upon the law of the place where the contract is made¹¹⁵ unless an interest in land is created or transferred, in which case the law of the place where the land is situated governs.¹¹⁶ However, a sovereignty's courts may refuse to en-

¹¹⁰ *International Harvester Co. v. Kentucky* (1914) 234 U. S. 579.

¹¹¹ *International Text Book Co. v. Pigg* (1910) 217 U. S. 91; *Star Chronicle Publishing Co. v. United Press Assn.* (C. C. A. 8, 1913) 204 F. 217; *Parsons-Willis Lumber Co. v. Stuart* (C. C. A. 5, 1910) 182 F. 779; *Atlas Engine Works v. Parkinson* (D. C. W. D. Wis. 1908) 161 F. 223.

¹¹² Statutes which provide for a fine or other penalty, but do not mention contracts are interpreted not to affect their validity. *Fritts v. Palmer* (1889) 132 U. S. 282. Cf. note 103 supra. Some statutes contain specific provisions to this effect. *Iowa Lillooet Gold Mining Co. Ltd. v. United States Fidelity & Guaranty Co.* (C. C. N. D. Ia. 1906) 146 F. 437.

¹¹³ *Langenkamp v. Broscala Chemical Co.* (D. C. S. D. Ohio 1927) 21 F. (2d) 207, reversed (C. C. A. 6, 1929) 32 F. (2d) 725 on the ground that the contract was not made in Indiana but in Ohio. Contra: *In re Conecuh Pine Lumber & Mfg. Co.*, (D. C. M. D. Ala. 1910) 180 F. 249; *A. H. Andrews Co. v. Colonial Theatre Co.* (D. C. E. D. Mich. 1922) 283 F. 471 both cases erroneously applying *Diamond Glue Co. v. United States Glue Co.* (1903) 187 U. S. 611.

Cases holding a contract made within the sovereignty void are: *Midland Linseed Products Co. v. Warren Bros. Co.* (C. C. A. 6, 1925) 46 F. (2d) 870; *County of Cullman, Ala. v. Vincennes Bridge Co.* (C. C. A. 5, 1918) 251 F. 473; *Loomis v. People's Construction Co.* (C. C. A. 6, 1914) 211 F. 453. See *Chattanooga National Building & Loan Assn. v. Denson* (1903) 189 U. S. 408.

¹¹⁴ *Munday v. Wisconsin Trust Co.* (1919) 252 U. S. 499, 503. Contra: *George v. Oscar Smith & Sons Co.* (C. C. A. 5, 1918) 250 F. 41.

¹¹⁵ *Equitable Life Assurance Society v. Clements* (1891) 140 U. S. 226; *New York Life Insurance Co. v. Cravens* (1900) 178 U. S. 389. Other rules find support in the authorities. See *Goodrich on Conflict of Laws*, (1927) p. 228.

¹¹⁶ *Goodrich on Conflict of Laws*, (1927) p. 333.

force a contract made elsewhere if secured through the activities of a local agent or performance is attempted within its territory in violation of the statute.¹¹⁷ This is because the enforcement of the valid contract would be contrary to the sovereignty's policy announced in the statute.

If the statute merely provides that the foreign corporation failing to comply therewith shall not maintain any action upon its contracts they are not void, but merely unenforceable in the sovereignty's courts.¹¹⁸ They may be enforced after the statute has been repealed¹¹⁹ or complied with.¹²⁰ State statutes of this type do not prohibit suit in the federal courts in the state.¹²¹

V. CONCLUSION

A sovereignty's legislative, executive and judicial power is, with the exception of citizens located abroad, limited to persons and property within its own territory. The application of this principle to corporations is difficult because corporations are intangible entities which have no location in space. This difficulty may be overcome by regarding the corporation as present wherever its agents and servants are acting for it. Thus a foreign corporation may be said to be subject to a sovereignty's jurisdic-

¹¹⁷ *Bothwell v. Buckbee Mears Co.* (1927) 275 U. S. 274. See the same case (1926) 166 Minn. 285, 207 N. W. 724. The same is true where the contract was made prior to the enactment of the statute and the foreign corporation attempts performance within the sovereignty's territory. Such a refusal to enforce the contract is not unconstitutional as impairing the obligations of contract. *Diamond Glue Co. v. U. S. Glue Co.* (1903) 187 U. S. 611.

¹¹⁸ *David Lupton's Sons Co. v. Automobile Club of America* (1912) 225 U. S. 489; *Brace v. Granger-Korsmo Construction Co.* (C. C. A. 8, 1929) 36 F. (2d) 661, 663 cert. den. (1930) 281 U. S. 738; *Louis Ilfeld Co. v. Union Pacific Ry. Co.* (C. C. A. 8, 1927) 23 F. (2d) 65 cert. den. (1928) 276 U. S. 635; *Republic Creosoting Co. v. Boldt Construction Co.* (C. C. A. 6, 1930) 38 F. (2d) 739; *Kawin & Co. v. American Colortype Co.* (C. C. A. 7, 1917) 243 F. 317; *Continental & Commercial Trust & Savings Bank v. Corey Bros. Construction Co.* (C. C. A. 9, 1913) 208 F. 976; *Dunlop v. Mercer* (C. C. A. 8, 1907) 156 F. 545; *Colby v. Cleaver* (C. C. Ida. 1908) 169 F. 206; *Groton Bridge & Mfg. Co. v. American Bridge Co.*, (C. C. N. D. N. Y. 1907) 151 F. 871. No federal question is presented by a state court's interpretation of a statute as either void or merely unenforceable. The state court's interpretation will be followed by the federal courts. *Allen v. Allegheny Co.* (1905) 196 U. S. 458; *Swing v. Weston Lumber Co.* (1907) 205 U. S. 275.

¹¹⁹ *Boatmen's Bank of St. Louis v. Fritzlen* (C. C. A. 8, 1915) 221 F. 154, 160 cert. den. (1915) 238 U. S. 641.

¹²⁰ *Johnson v. New York Breweries Co.* (C. C. A. 2, 1910) 178 F. 513.

¹²¹ All cases cited in note 118 except *Dunlop v. Mercer*.

tion whenever one or more of its agents or servants acting in its behalf is within that sovereignty's territory. This is not a new idea. The first decisions of the United States Supreme Court were based upon it. The question in these cases was whether or not jurisdiction over a foreign corporation was acquired by service upon one of its agents within the state. The Supreme Court held that jurisdiction was acquired but that it must appear that the agent was acting or doing business for the corporation, that is, that he must be acting in a representative capacity. Later cases adopted the phrase "doing business" as the test of jurisdiction thus obscuring the real basis of the earlier decisions. The idea that jurisdiction depends upon the presence of an agent acting for the corporation again appears in Justice Day's language in *International Harvester Co. v. Kentucky* where he said "when a corporation of one state goes into another in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that state."¹²²

The adoption of the presence of an agent or servant acting for the corporation as the test of jurisdiction would effect no revolution. The authorities would be undisturbed except that the Supreme Court would be obliged to take a definite stand upon those issues upon which its own decisions now conflict. The "mere solicitation" rule should be abandoned. *St. Louis Southwestern Railway Co. v. Alexander*¹²³ and *International Harvester Co. v. Kentucky*¹²⁴ should be followed. *Green v. Chicago, Burlington & Quincy Railroad Co.*¹²⁵ and *People's Tobacco Co. v. American Tobacco Co.*¹²⁶ should be overruled. The Supreme Court should recognize that in service cases the question is not only whether or not the foreign corporation was doing business in the state through an agent, but also whether or not it was transacting business there at the time of service. Cases holding that jurisdiction was not acquired although the corporation had transacted some business in the state at a time prior to service ought not to be explained on the ground that the transactions were merely isolated or occasional. The recent cases, *Rosenburg Co. v. Curtis Brown Co.*¹²⁷ and *James Dickinson Farm Mortgage Co. v. Harry*,¹²⁸ hold-

¹²² Supra note 41.

¹²³ Supra note 82.

¹²⁴ Supra note 83.

¹²⁵ Supra notes 81 and 73.

¹²⁶ Supra note 85.

¹²⁷ Supra notes 55 and 50.

¹²⁸ Supra note 50.

ing that "Jurisdiction over a corporation of one state cannot be acquired in another state or district in which it has no place of business and is not found merely by serving process upon an executive officer temporarily therein even if he is there on business of the company" should be overruled and *Commercial Mutual Accident Co. v. Davis*¹²⁹ should be followed.

These changes are desirable in the interest of certainty and predictability. It is true that justice ought not be sacrificed in any considerable degree to obtain certainty and predictability, but considerations of justice are not involved. The question is one of power and the only policy involved is that which lies behind the general principle limiting a state's power to persons and property within its own territory.

¹²⁹ Supra note 49. See also notes 47 and 48.